UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

WILLIAM GLENN BOYD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**Civil Action No. CV-00-S-2919-E**
	)	
MICHAEL HALEY, Commissioner,	)	
Alabama Department of Corrections,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION AND ORDERS

This court previously entered a memorandum opinion and order denying William Glenn Boyd's petition for writ of *habeas corpus*, seeking relief from his state court conviction for capital murder and death sentence pursuant to 28 U.S.C. § 2254.[1] Boyd filed a timely motion to alter or amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure.[2] In accordance with an order entered on July 11, 2005, Boyd and respondent submitted additional briefs addressing the impact, if any, of the Supreme Court's decision in *Rompilla v. Beard*, 535 U.S.374 (2005), upon Boyd's ineffective assistance of counsel claims.[3]

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[1] *See* doc. nos. 40 (memorandum opinion) and 41 (order).

[2] *See* doc. no. 42 (Rule 59 motion). *See also* doc. no. 44 (respondent's opposition to motion).

[3] *See* doc. nos. 46 and 47.

I. STANDARDS OF REVIEW

Federal Rule of Civil Procedure 59(e) acknowledges that a motion to alter or amend a judgment may be filed within ten days after entry of the subject judgment, but does not specify the grounds for granting relief.[4] As a consequence, the decision of whether to alter or amend a judgment is largely committed to "the sound discretion of the district judge." *American Home Assurance Co. v. Glenn Estess & Associates, Inc*., 763 F.2d 1237, 1238-39 (11th Cir.1985). Even so, as another court within this Circuit has recognized, there are "four basic grounds for granting a Rule 59(e) motion":

> (1) manifest errors of law or fact upon which the judgment was based; (2) newly discovered or previously unavailable evidence; (3) manifest injustice in the judgment; and (4) an intervening change in the controlling law. 11 Wright, Miller & Kane, Federal Practice and Procedure § 2810.1 (2d ed.1995). Rule 59(e) may not be used to relitigate old matters or to present arguments or evidence that could have been raised prior to judgment. *See O'Neal v. Kennamer*, 958 F.2d 1044, 1047 (11th Cir. 1992). Furthermore, a judgment will not be amended or altered if to do so would serve no useful purpose. Wright, Miller & Kane, *supra*.

McNair v. Campbell, 315 F. Supp. 2d 1179, 1181-82 (M.D. Ala. 2004), *rev'd on other grounds*, 416 F.3d 1291 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 1828 (2006).

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[4] Fed. R. Civ. P. 59(e) provides that: "Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment."

As discussed in this court's previous opinion,[5] a writ of habeas corpus can be granted under 28 U.S.C. § 2254 only if the petitioner establishes, by clear and convincing evidence,[6] that the challenged state court ruling was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).[7] "The 'contrary to' and 'unreasonable application' clauses of § 2254(d)(1) are separate bases for reviewing a state court's decisions." *Putman v. Head*, 268 F.3d 1223, 1241

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[5] *See* doc. no. 40, at 34-39.

[6] *See* 28 U.S.C. § 2254(e)(1) ("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. *The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence*.") (emphasis supplied). *See also McNair v. Campbell*, 416 F.3d 1291, 1297 (11th Cir. 2005) ("Moreover, a state court's factual determinations are presumed correct unless rebutted by clear and convincing evidence.") (citing 28 U.S.C. § 2254(e)(1)), *cert. denied*, 126 S. Ct. 1828 (2006).

[7] The full text of § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), reads as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254(d) (2006).

(11th Cir. 2001) (citing *Williams v. Taylor*, 529 U.S. 362, 404-05 (2000)).

As Justice O'Connor observed, when speaking for a majority of the Court as to Part II of the opinion in *Williams v. Taylor*, a state-court determination can be "contrary to" clearly established Supreme Court holdings[8] in either of two ways:

> First, a state-court decision is contrary to this Court's precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. Second, a state-court decision is also contrary to this Court's precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours.

Williams, 529 U.S. at 405 (O'Connor, J., majority opinion as to Part II).

Likewise, a state-court ruling can be an "unreasonable application" of clearly established Supreme Court precedent in either of two ways:

> First, a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

Id. at 407. The question of whether a particular application of Supreme Court

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[8] The Supreme Court's decision in *Williams v. Taylor* added a gloss to § 2254(d)(1)'s statutory phrase "clearly established Federal law, as determined by the Supreme Court of the United States," when construing that language as limiting the attention of lower federal courts to "holdings, as opposed to the dicta, of the [Supreme] Court's decisions as of the time of the relevant state-court decision." 529 U.S. at 412.

precedent was "reasonable" turns not on subjective factors, but upon whether the application at issue was "objectively unreasonable" — not just incorrect or erroneous. *See Wiggins v. Smith*, 539 U.S. 510, 521 (2003) ("In order for a federal court to find a state court's application of our precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous."). Stated differently, the question is not whether the state court "correctly" decided the issue, but whether its ruling was "reasonable," *even if incorrect*. *See Bell v. Cone*, 535 U.S. 685, 694 (2002).

The standard for judging the effectiveness of criminal defense attorneys under the Sixth Amendment was established by the Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), holding that:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. *First*, the defendant must show that counsel's performance was *deficient*. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Second*, the defendant must show that the deficient performance *prejudiced the defense*. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Unless a defendant makes both showings*, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687 (emphasis supplied).

To establish that counsel's performance was *deficient*, a petitioner must show

that his attorney's representation "fell below an objective standard of reasonableness": a standard that is gauged in terms of "prevailing professional norms." *Id*. at 688 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."); *see also*, *e.g*., *Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003) (stating that the standards for capital defense work promulgated by the American Bar Association are "standards to which we have long referred as 'guides to determining what is reasonable'") (quoting *Strickland*, 466 U.S. at 688).

To establish *prejudice*, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

The *Strickland* standard is framed in the conjunctive, and a petitioner accordingly bears the burden of proving both the "deficient performance" and "prejudice" prongs of the analytical framework by "a preponderance of competent evidence." *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) (*en banc*). This is a high hurdle, and it is not easily cleared, because "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690.

Further, district courts are admonished to remember that an accused defendant has only a constitutional right to adequate counsel; stated differently, he is not entitled to the very best legal representation. *Stone v. Dugger*, 837 F.2d 1477 (11th Cir. 1988). As a result, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Waters v. Thomas*, 46 F.3d 1506, 1511 (11th Cir. 1995) (*en banc*).

II. DISCUSSION

After careful review of the briefs, the record, and this court's prior memorandum of opinion, this court concludes that the grounds asserted in Part "III" of Boyd's motion as a basis for altering or amending the judgment, as well as Boyd's request for an evidentiary hearing in Part "IV" of his motion, are both due to be denied without additional discussion. However, the claims asserted in Parts "I" and "II" of the motion (to the extent that the claims in Part "II" pertain to Boyd's juror misconduct claim) merit closer scrutiny.

A. Part "I" of Boyd's Rule 59 Motion — *Ineffective assistance of trial counsel for failing to investigate and present mitigating evidence to the jury or trial court judge*

This court previously found that Boyd's trial counsel deprived him of constitutionally effective assistance when failing to conduct a meaningful, pre-trial investigation into Boyd's background and character, as a consequence of which

counsel failed to present relevant and compelling mitigating evidence during the penalty and sentencing phases of trial. *See* doc. no. 40 (memorandum opinion) § IV(B)(1)(a), at 43-59. Nevertheless, this court ultimately concluded that Boyd had failed to show that he had been prejudiced as a result of his counsel's deficient performance. *Id*. §§ IV(B)(1)(b), IV(B)(2), at 60-70. The following two sections summarize the reasons for those determinations.

1. Deficient performance of trial counsel

Boyd's trial attorneys made no effort to discover potential mitigation evidence, and had no planned strategy for the penalty phase of trial,[9] other than for spending "an unspecified amount of time . . . with Boyd's sister, Ms. Cindy Pierce, prior to trial; and, a hurried conversation with Ms. Pierce between the guilt and penalty phases of trial, during which counsel instructed her to read a short summary of her brother's life to the jury, in an effort to 'humanize' Boyd." Doc. no. 40, at 46-47

[9] Although the Alabama Court of Criminal Appeals alluded to the "record on direct appeal," when it mentioned that Cindy Pierce (Boyd's sister), Geraldine Oliver (Boyd's mother), Herbert Hicks (Boyd's pastor), and Boyd himself testified on Boyd's behalf at the penalty hearing, the Court neither identified nor addressed the substance of any testimony elicited from any of these witnesses. *See Boyd v. State*, 746 So.2d 364, 367-77 (Ala. Crim. App. 1999). A review of the same Court's opinion on direct appeal also fails to identify or address the substance of any testimony presented at the penalty phase of the trial, and only shows the Court of Criminal Appeals found that the record supported the trial court's decision to consider "evidence concerning Boyd's background and character as mitigating circumstances." *Boyd v. State*, 542 So.2d 1247, 1260 (Ala. Crim. App. 1988).

(footnote omitted).[10]

The quantity and quality of mitigation evidence that could have been ascertained, if counsel had diligently pursued an investigation of Boyd's life history, was diametrically different from that which actually was presented to the jury and sentencing judge:

> In stark contrast, the mitigation evidence that could have been discovered prior to trial and presented to the jury, but which was not tendered until the Rule 32 hearing, was described by the Alabama Court

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[10] The omitted footnote reads as follows:

> Boyd insists that his trial attorneys' sole effort to obtain mitigating evidence was to ask his sister to write down some facts about him, without any guidance, and then to have her read what she had written to the jury. He claims that the only other contacts by trial counsel with members of his family consisted of little more than informing them of court proceedings, and that no attempts were made to gather records, to talk to members of the community or extended family, or to obtain information from anyone about the circumstances of Boyd's upbringing and family life. *See* doc. no. 27, at 11. Boyd argues that, if counsel had interviewed family members, they would have learned of his history of abuse and neglect. *Id.* at 12-14. In addition to witness accounts, Boyd argues that his attorneys should have obtained numerous public documents that would have demonstrated the circumstances of his upbringing, such as: records from the Department of Human Resources (which would have shown that his mother often was neglectful, and lacked the psychological and financial resources to care for her children); hospital records (which would have shown the alcoholism of his father and grandparents, and his mother's chronic depression); school records (which would have established his learning disabilities and numerous absences); criminal records (which would have shown that his father often was incarcerated); and records documenting the mental problems of his younger sister, as well as a similar lack of parental response to her mental problems. *Id*. at 15-16. Boyd maintains that none of this evidence was presented because it simply was not investigated and gathered. In other words, there was no "strategy" against using this evidence, because his counsel never learned of its existence.

Doc. no. 40, at 47 n.25.

of Criminal Appeals in the following manner:

> At the Rule 32 hearing, Boyd presented a wealth of testimony characterizing his childhood as consisting of continual gross poverty; gross physical and emotional abuse; gross neglect; and various humiliations. These indignities were bestowed at the hands of a cruel and alcoholic father and stepfather; a mentally disturbed mother; and loving but severely alcoholic grandparents.
>
> In addition to testimony from family and friends confirming Boyd's terrible childhood, Boyd's mitigation argument relies heavily on what experts would have said during the penalty phase of the trial had they been called as witnesses.[11]
>
> At the Rule 32 hearing, Boyd called Jan Vogelsang, a clinical social worker with extensive expertise in victimization and trauma. She testified that in preparing a psychosocial assessment on Boyd, she determined that Boyd came from "one of the worst family situations [she] ha[d] seen in terms of violence

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[11] In a footnote to this portion of the quoted opinion, the Alabama Court of Criminal Appeals stated:

> This characterization of his horrible childhood was presented at the Rule 32 hearing by the following witnesses, whom Boyd asserts trial counsel should have called as witness at the sentencing phase of his trial: Jan Vogelsang, a licensed social worker and psychotherapist; Cindy Pierce, his sister (she also testified at [the] sentencing phase); Bill Whatley, a retired Anniston police officer who had investigated domestic disputes at Boyd's childhood home; Roy C. Snead, Jr., Sheriff of Calhoun County, who was familiar with William Hardy Boyd Jr.'s (Boyd's father['s]) arrest record and alcoholism; Kathy Gurley, who would have testified to the circumstances surrounding Boyd's childhood; Charles Pierce, Jr., Boyd's brother-in-law, who would have testified to the circumstances surrounding Boyd's childhood; Joseph Burton, a forensic pathologist from Georgia who reviewed material in Boyd's case; Carl Majeskey, a consultant for lawyers and insurance companies in the field of firearms; and Louis Mulray Tetlow, a licensed clinical psychologist. Boyd also presented records from the Department of Human Resources, hospitals, and courts to support the oral testimony.

Boyd v. State, 746 So. 2d at 377 n.5.

> and neglect, alcoholism. It certainly rank[ed] up there in the top three or four worst cases." (Vol.17, R. 292-93.) However, when asked if Boyd made a choice to participate in the murders, Vogelsang testified that, "[Boyd] made a choice to go there, and once he was there, obviously things got out of control. Everyone has choices, but sometimes they make bad decisions and make bad choices, and in this case he certainly did that." (Vol. 17, R. page 279.)
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> Louis Mulray Tetlow, a licensed clinical psychologist, testified that Boyd "really does not have a major mental disorder." (Vol.19, R. 446.) He stated that Boyd was not good at looking ahead to the consequences of his behavior. (Vol.19, R. 450.) Tetlow stated that the murders in this case were not completely the result of Boyd's upbringing and that he did have some control over his actions in the situation. (Vol.20, R. 471.)
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> Karl Kirkland, the State's expert psychologist, testified that he agreed with Vogelsang's assessment that Boyd "clearly experienced abuse as he grew up." (Vol.20, R. 532.) However, Kirkland also testified that in his opinion, Boyd's having grown up in a terribly dysfunctional home did not cause him to murder Fred Blackmon and Evelyn Blackmon. (Vol.20, R. 526.) According to Kirkland, the murders were not the result of Boyd's having been subjected to parental alcohol abuse, physical abuse, poor parenting, poverty, or any combination of any of these events in his childhood. It was Kirkland's conclusion that the murders were the result of an "individual making bad choices." (Vol.20, R. 535.)

Boyd v. State, 746 So. 2d at 377 (bracketed alterations in original) (footnote omitted).

In other words, the Alabama Court of Criminal Appeals acknowledged that trial counsel failed to investigate, organize, and present "a wealth of testimony" suggesting that Boyd's character had been shaped by a "childhood . . . consisting of continual gross poverty;

gross physical and emotional abuse; gross neglect; and various humiliations"; and, that all of these "indignities were bestowed at the hands of a cruel and alcoholic father and stepfather; a mentally disturbed mother; and loving but severely alcoholic grandparents." Further, "a clinical social worker with extensive expertise in victimization and trauma" characterized that background as "one of the worst family situations [she] ha[d] seen in terms of violence and neglect, alcoholism. It certainly rank[ed] up there in the top three or four worst cases." *Boyd v. State*, 746 So. 2d at 377 (bracketed alterations in original).

Despite these unrefuted facts, the state appellate court characterized the paltry proof of mitigating circumstances presented during the penalty phase of Boyd's trial as the product of a "defense strategy," and declined to "second-guess[]" the "tactical choices" of trial counsel. *Id*. at 379. In reaching that conclusion, the Alabama Court of Criminal Appeals ignored clear and convincing evidence establishing that defense counsel did *not* devise a professionally-competent, mitigation "strategy" prior to trial, *nor* did they make an informed "tactical choice" to present the penalty-phase case in the manner it was put before the jury.

The concept of a "tactical choice" presumes three facts not supported by the evidence in this case: (1) that trial counsel had conducted a professionally-competent investigation into the defendant's past life, searching for events or circumstances that might either explain the offense conduct or mitigate punishment for that conduct; (2) as a result of that investigation, counsel had become privy to a body of mitigation information relevant to the defendant's character and background that could be presented during the penalty phase of trial as a basis for a sentence of life imprison-ment without parole instead of death; and (3) applying prior trial experience and professional judgment, counsel *consciously* made a *reasoned decision* to present all, some, or none of the information known to counsel. No such "tactical choice" was made in this case, because counsel undisputedly made no effort, much less a reasonably competent effort, to ascertain Boyd's background prior to trial. As a result, counsel possessed no information from which they could devise a penalty phase "strategy," or upon the

> basis of which counsel could make professionally competent "tactical choices," when it became time to present mitigation evidence.
>
> The mere invocation of the term "strategy" by the Alabama Court of Criminal Appeals does not result in its spontaneous materialization. The word "strategy" is defined as meaning, among other things, "**2a:** a careful plan or method; a clever stratagem, **b:** the art of devising or employing plans or stratagems toward a goal." *Webster's Third New International Dictionary* 2256 (2002). The purported "goal" of Boyd's trial counsel was that of "humaniz[ing him], so to speak." PCR Vol. 16 at 132, 153; Tab P-51. However, the only member of Boyd's defense team who testified at the Rule 32 hearing candidly admitted no plan or method of attaining that goal was devised prior to trial. The direction to Boyd's sister, to draft a short history of his life for recitation to the jury, was the product of exigency — not competent, professional deliberation and forethought.
>
> Thus, this court concludes that petitioner has "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984) (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)); *see also Fugate v. Head*, 261 F.3d 1206, 1217 (11th Cir. 2001) (observing that "a complete failure to investigate may constitute deficient performance of counsel"); *Housel v. Head*, 238 F.3d 1289, 1294 (11th Cir. 2001) ("A failure to investigate can be deficient performance in a capital case when counsel totally fails to inquire into the defendant's past or present behavior or life history.").

Doc. no 40, at 48-53 (emphasis in original).

These findings led this court to conclude that Boyd had demonstrated that his trial attorneys' performance "fell below an objective standard of reasonableness," *Strickland*, 466 U.S. at 688, and that their omissions were "so serious that counsel

was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Id.* at 687.

> The performance of Boyd's trial counsel was objectively deficient, because clear and convincing evidence establishes that counsel failed to investigate Boyd's character and background in preparation for the penalty phase of trial. *See*, *e.g.*, *Middleton v. Dugger*, 849 F.2d 491, 493 (11th Cir. 1988) ("An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence.") (citing *Thompson v. Wainwright*, 787 F.2d 1447, 1451 (11th Cir. 1986). Further, there was a "wealth" of mitigating information that could have been uncovered in a reasonably competent investigation. Finally, counsels' last-minute effort to cobble together at least *something* in the nature of mitigating evidence was the product of exigent circumstances — *not* a tactical decision made on the basis of a preconceived and professionally competent strategy. These errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" to the United States Constitution as made applicable to the states by the Fourteenth Amendment. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. For all of these reasons, the Alabama Court of Criminal Appeals erred when concluding that the performance of Boyd's trial attorneys was not objectively deficient. Such a ruling represented an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States in *Strickland v. Washington*, *supra*, and "reveals an obvious failure to consider the totality of the omitted mitigation evidence." *Williams*, 529 U.S. at 416, 120 S. Ct. at 1525 (O'Connor, J.).

Doc. no. 40, at 58-59. *See also*, *e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003) (holding, under similar facts, that the investigation undergirding trial counsel's decision to not introduce mitigating evidence "fell short of . . . the standards for capital defense work articulated by the American Bar Association (ABA) —

standards to which we long have referred as 'guides to determining what is reasonable'") (quoting *Strickland*, 466 U.S. at 688); *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (holding, under similar facts, that trial counsel's "failure to introduce the comparatively voluminous amount" of mitigating evidence "was not justified by a tactical decision" made following "a thorough investigation into the defendant's background") (citing 1 *ABA Standards for Criminal Justice* § 4-4.1, commentary, at p. 4-55 (2d ed. 1980)). *Cf. Rompilla v. Beard*, 545 U.S. 374, —, 125 S. Ct. 2456, 2460 (2005) (holding that, "even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial").

2. Prejudice

Despite finding that the assistance rendered by Boyd's trial counsel in the investigation and presentation of a case for life was constitutionally defective, this court ultimately concluded that Boyd had failed to establish that their deficient performance prejudiced his defense during the second (or "penalty") phase of trial before the jury.

In order to satisfy the second, or "prejudice" prong of *Strickland*,

> Boyd must prove that he "suffered *actual prejudice* due to the ineffectiveness of his trial counsel before relief will be granted." *Middleton v. Dugger*, 849 F.2d 491, 493 (11th Cir. 1988) (emphasis in original). To establish "actual prejudice," Boyd "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.
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> Boyd has not satisfied — indeed, as a matter of clearly established circuit precedent he cannot satisfy — this standard. Despite his attorneys' pathetically incomplete and objectively deficient performance in preparing and presenting a case for life during the penalty phase of trial, a majority of the jurors still recommended that Boyd be sentenced to life without the possibility of parole. *See Mills v. Singletary*, 161 F.3d 1273, 1286 (11th Cir. 1998) (holding that, even assuming the performance of defense counsel was deficient, "Mills cannot demonstrate that the alleged failure to present mitigating evidence prejudiced him at the penalty phase because the jury recommended a life sentence"); *Routly v. Singletary*, 33 F.3d 1279, 1297 (11th Cir. 1994) ("Routly cannot show that any failure to present mitigating evidence to the jury prejudiced him to any degree whatsoever because the jury recommended a sentence of life imprisonment anyway.").

Doc. no. 40, at 60-61.[12]

Later in the opinion, this court stated its agreement with the conclusion of the Alabama Court of Criminal Appeals that Boyd also had not shown that his attorneys' deficient performance prejudiced him during the third (or "sentencing") phase of trial,

[12] This court notes its disagreement with circuit precedent. Speaking from the perspective of a former Alabama Circuit Judge who presided over many capital murder trials, there is — as there should be — a significant quantitative difference between the weight accorded a bare majority (7-5) vote, and 10, 11, or 12 votes for life.

conducted before the trial judge — the ultimate sentencing authority under Alabama law. *See* doc. no. 40, at 61-70.

Careful consideration of the arguments in Part "I" of Boyd's brief in support of his Rule 59(e) motion to alter or amend the judgment, however, as well as additional attention to Supreme Court precedent, lead this court to the conclusion that it not only erred, but erred egregiously, in this part of the prior opinion.

3. Reevaluation of prejudice

The initial reason stated by the Alabama Court of Criminal Appeals for rejecting Boyd's argument that his trial counsel failed to present sufficient mitigating evidence to persuade the trial judge to ratify the jury's recommendation that Boyd be sentenced to life was that Alabama Code § 13A-5-47 (1975) did "not provide for the presentation of additional mitigation evidence at sentencing by the trial court. Therefore, trial counsel did not err in failing to do so." *Boyd v. State*, 746 So.2d 364, 398 (Ala. Crim. App. 1999). As this court previously noted — but only in passing, in a marginal note to the textual discussion — that holding was

> error as a matter of both state and clearly established federal law. The following statutory language clearly contemplates that additional evidence may be submitted to the ultimate sentencing authority:
>
> > Based upon the evidence presented at trial, *the evidence presented during the sentence hearing*, and the pre-sentence investigation report *and any evidence*

> *submitted in connection with it*, the trial court shall enter specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in Section 13A-5-49, *each mitigating circumstance enumerated in Section 13A-5-51*, and *any additional mitigating circumstances offered pursuant to Section 13A-5-52*. The trial court shall also enter written findings of facts summarizing the crime and the defendant's participation in it.

Ala. Code § 13A-5-47(d) (emphasis added). In any event, the Supreme Court's decision in *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), firmly established this proposition:

> [T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 604, 98 S. Ct. at 2964-65 (emphasis in original). The Court added that *any* statute

> that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, the risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

Id. at 605, 98 S. Ct. at 2965.

Doc. no. 40, at 64 n.38 (emphasis in original).

Stated differently, the ruling of the state court on this issue not only was contrary to the letter of *state* law, but it also was contrary to clearly established Federal law, as determined by the Supreme Court's decision in *Lockett v. Ohio*, holding that a state statute that limited the range of mitigating circumstances that could be considered by the ultimate sentencing authority when determining the sentence to be imposed is "incompatible with the Eighth and Fourteenth Amendments. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." *Lockett v. Ohio*, 438 U.S. 586, 608-09 (1978) (Burger, C.J., plurality opinion). *Cf. Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982) ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.").

As a result of that fundamental error of clearly established Federal law, the trial judge did not hear the "evidence of the serious abuse [Boyd] suffered as a child; the neglect of his parents; the chaotic and dysfunctional homes in which he was reared; the alcoholism in his home; the poverty, inadequate food, and lack of medical care; the effect of all of this on his development; or the evidence of those in the community who worried about him as he grew up." *Boyd v. State*, 746 So. 2d at 397 (quoting Appellant's Brief).

This court therefore erred when reducing Boyd's arguments regarding the prejudice he suffered as a result of trial counsel's failure to present sufficient mitigating evidence to dissuade the trial judge from overriding the jury's recommendation that Boyd be sentenced to life to this trifling proposition: "Boyd's argument — *i.e.*, *if* his attorneys had competently prepared a mitigation case, and *if* more than seven jurors had voted in favor of life, then the trial judge *might* have accepted the jury's advisory verdict — amounts to a speculative foray into conceivable, but imponderable, outcomes." Doc. no. 40, at 69-70.

Nevertheless, there are several, far-more-fundamental reasons that this court erred when rejecting Boyd's prejudice arguments.

a. *The character and weight of the mitigation evidence in this case is at least equivalent to that which the Supreme Court has determined that it is prejudicial to exclude, or fail to consider appropriately*

First, the "wealth of testimony" presented at Boyd's Rule 32 hearing "characterizing his childhood as consisting of continual gross poverty; gross physical and emotional abuse; gross neglect; and various humiliations . . . bestowed at the hands of a cruel and alcoholic father and stepfather; a mentally disturbed mother; and loving but severely alcoholic grandparents," *Boyd v. State*, 746 So. 2d at 377, was at least as severe as that mitigating evidence which the Supreme Court found to be

constitutionally prejudicial when excluded, or not taken appropriately into account, in such cases as the following: *Williams v. Taylor*, 529 U.S. 362, 395-98 (2000) (holding in a § 2254 habeas case that the petitioner was denied constitutionally effective assistance of counsel when his attorneys failed to investigate and present during the sentencing phase of a capital case a "voluminous amount" of evidence concerning the defendant's "nightmarish childhood"); *Wiggins v. Smith*, 539 U.S. 510, 516, 524-25 (2003) (holding in a § 2254 habeas appeal that the petitioner was denied constitutionally effective assistance of counsel when his attorneys failed to investigate and present during the sentencing phase of a capital case evidence of "severe physical and sexual abuse petitioner suffered at the hands of his mother and while in the care of a series of foster parents"); and *Skipper v. South Carolina*, 476 U.S. 1, 3 (1986) (holding that it was constitutional error for the trial judge to exclude the "testimony of two jailers and one 'regular visitor' to the jail to the effect that petitioner had 'made a good adjustment' during his time spent in jail," because it "impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender").

b. *Exclusion of Boyd's mitigation evidence for lack of a causal connection*

To grasp the full implications of the most egregious error committed by this

court when rejecting Boyd's prejudice arguments, however, it first is necessary to reiterate key passages from the Alabama Court of Criminal Appeals' opinion on the issue.

> Boyd has not shown that the lack of psychological evidence or any other evidence at the sentencing phase prejudiced him. In fact, the evidence suggested that *Boyd's childhood*, *although terrible*, *was not a factor in his committing two murders*. Although family and friends testified at the Rule 32 hearing that Boyd had endured a terrible childhood and mental health experts testified in an effort to connect Boyd's childhood to his participation in the double murder, *it was the conclusion of each expert that, at the time of the murders, Boyd knew right from wrong but made a choice to commit murder*. We do not believe that this additional evidence would have shifted the balance between the aggravating circumstances and the mitigating circumstances and changed the outcome of the trial.
>
> * * * *
>
> Although it was established at the Rule 32 hearing that Boyd had had a traumatic and unhappy childhood, *there was also testimony that he knew right from wrong and that he had just made a bad decision in committing a double murder*. Had the testimony presented at the Rule 32 hearing regarding Boyd's childhood been presented at the sentencing hearing it is highly unlikely that the trial court would have been persuaded to sentence Boyd differently.
>
> We cannot say that Boyd's counsel's performance was deficient or that Boyd suffered prejudice because counsel failed to call additional mitigation witnesses at sentencing.

Boyd v. State, 746 So. 2d at 379 (emphasis added).

The emphasized passages in the foregoing extracts from the intermediate state

appellate court's postconviction opinion illustrate that the state court based its rejection of Boyd's prejudice arguments, at least in part, on the lack of a causal nexus between his "traumatic and unhappy childhood" and the crimes he committed. That constitutes a ruling that is *both* "contrary to," *and* "an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The following cases hold that it is error to either exclude, or fail to give appropriate consideration to, evidence offered in mitigation of the sentence to be imposed when a defendant cannot demonstrate a causal linkage between that evidence and the crime committed: *Smith v. Texas*, 543 U.S. 37 (2004) (*per curiam*); *Tennard v. Dretke*, 542 U.S. 274 (2004); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Each of the holdings in those cases is summarized in the following sections.

i. *Eddings v. Oklahoma*, 455 U.S. 104 (1982)

Eddings came to the Supreme Court on direct appeal from an Oklahoma capital murder conviction and death sentence. The sixteen-year-old defendant had "presented substantial evidence at the [sentencing] hearing of his troubled youth." *Id*. at 107.[13] Even though the trial judge "found that Eddings' youth was a mitigating

[13] The substance of the mitigation evidence presented was as follows:

The testimony of his supervising Juvenile Officer indicated that Eddings had been

factor of great weight," *id*. at 108, he refused to "consider in mitigation the circumstances of Eddings' unhappy upbringing and emotional disturbance" because, in the judge's opinion, the law did not permit him to do so. *Id*. at 109. The Oklahoma Court of Criminal Appeals affirmed the sentence of death and "agreed with the trial court that only the fact of Eddings' youth was properly considered as a mitigating circumstance," *id*., because there was no causative linkage between the evidence of the defendant's "troubled youth" and the crime he committed.

> [Eddings] also argues his mental state at the time of the murder. He stresses his family history in saying he was suffering from severe

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> raised without proper guidance. His parents were divorced when he was 5 years old, and until he was 14 Eddings lived with his mother without rules or supervision. There is the suggestion that Eddings' mother was an alcoholic and possibly a prostitute. By the time Eddings was 14 he no longer could be controlled, and his mother sent him to live with his father. But neither could the father control the boy. Attempts to reason and talk gave way to physical punishment. The Juvenile Officer testified that Eddings was frightened and bitter, that his father overreacted and used excessive physical punishment: "Mr. Eddings found the only thing that he thought was effectful with the boy was actual punishment, or physical violence-hitting with a strap or something like this."
>
> Testimony from other witnesses indicated that Eddings was emotionally disturbed in general and at the time of the crime, and that his mental and emotional development were at a level several years below his age. A state psychologist stated that Eddings had a sociopathic or antisocial personality and that approximately 30% of youths suffering from such a disorder grew out of it as they aged. A sociologist specializing in juvenile offenders testified that Eddings was treatable. A psychiatrist testified that Eddings could be rehabilitated by intensive therapy over a 15- to 20-year period. He testified further that Eddings "did pull the trigger, he did kill someone, but I don't even think he knew that he was doing it." The psychiatrist suggested that, if treated, Eddings would no longer pose a serious threat to society.

Eddings, 455 U.S. at 107-08 (citations and footnotes omitted).

> psychological and emotional disorders, and that the killing was in actuality an inevitable product of the way he was raised. There is no doubt that the petitioner has a personality disorder. But all the evidence tends to show that *he knew the difference between right and wrong at the time he pulled the trigger*, and that is the test of criminal responsibility in this State. For the same reason, the petitioner's family history is useful in explaining why he behaved the way he did, *but it does not excuse his behavior*.

Eddings, 455 U.S. at 109-10 (quoting *Eddings v. State*, 616 P.2d 1159, 1170 (Okla. Ct. Crim. App. 1980)) (emphasis supplied) (internal quotation marks omitted) (alteration in original).

The Supreme Court reversed, holding that "the background and mental and emotional development" of the defendant must be "duly considered in sentencing," even if it "does not suggest an absence of responsibility for the crime of murder." *Id*. at 116.

> The Court of Criminal Appeals . . . found that the evidence in mitigation was not relevant *because it did not tend to provide a legal excuse from criminal responsibility*. Thus the court conceded that Eddings had a "personality disorder," but cast this evidence aside on the basis that "he knew the difference between right and wrong . . . and that is the test of criminal responsibility." Similarly, the evidence of Eddings' family history was "useful in explaining" his behavior, but it did not "excuse" the behavior. *From these statements it appears that the Court of Criminal Appeals also considered only that evidence to be mitigating which would tend to support a legal excuse from criminal liability*.
>
> We find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in *Lockett*.

> *Just as the State may not by statute preclude the sentencer from considering any mitigating factor*, *neither may the sentencer refuse to consider, as a matter of law*, *any relevant mitigating evidence*. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. *But they may not give it no weight by excluding such evidence from their consideration*.

Eddings, 455 U.S. at 113-14 (emphasis supplied) (citations and footnotes omitted).

The Supreme Court's opinion, reversing Eddings's death sentence and remanding the case for new sentencing procedures, directed that: "On remand, the state courts *must* consider *all* relevant mitigating evidence and *weigh it* against the evidence of the aggravating circumstances. We do not weigh the evidence for them." *Id*. at 117 (emphasis supplied).[14]

Justice O'Connor, who filed a concurring opinion in *Eddings*, emphasized the purposes served by remanding the case for the state courts to reconsider all relevant mitigating evidence, and determine its proper weight in relation to the evidence of aggravating circumstances, in the following manner:

> I believe that the reasoning of the plurality opinion in *Lockett* compels a remand so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."

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[14] *See also Eddings*, 455 U.S. at 118 n.* (O'Connor, J., concurring) ("Because the trial court's failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing.").

> I disagree with the suggestion in the dissent that remanding this case may serve no useful purpose. Even though the petitioner had an opportunity to present evidence in mitigation of the crime, it appears that the trial judge believed that he could not consider some of the mitigating evidence in imposing sentence. *In any event*, *we may not speculate as to whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances*, or whether the difference between this Court's opinion and the trial court's treatment of the petitioner's evidence is "purely a matter of semantics," as suggested by the dissent. *Woodson* and *Lockett* require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

Eddings, 455 U.S. at 119 (O'Connor, J., concurring) (emphasis supplied).

ii. *Skipper v. South Carolina*, 476 U.S. 1 (1986)

Skipper was another case that rose to the Supreme Court on direct appeal from a state capital murder conviction and death sentence, and the Court held that it was constitutional error for the trial judge to exclude relevant, mitigating evidence: the "testimony of two jailers and one 'regular visitor' to the jail to the effect that petitioner had 'made a good adjustment' during his time spent in jail," *id*. at 3, even though the inferences that could be drawn from such evidence "would not relate specifically to petitioner's culpability for the crime he committed":

> The State does not contest that the witnesses petitioner attempted to place on the stand would have testified that petitioner had been a well-behaved and well-adjusted prisoner, nor does the State dispute that the jury could have drawn favorable inferences from this testimony regarding petitioner's character and his probable future conduct if

> sentenced to life in prison. *Although it is true that any such inferences would not relate specifically to petitioner's culpability for the crime he committed*, there is no question but that such inferences would be "mitigating" in the sense that they might serve "as a basis for a sentence less than death."

476 U.S. at 4-5 (emphasis supplied) (citation omitted) (quoting *Lockett*, 438 U.S. at 604).[15]

iii. *Tennard v. Dretke*, 542 U.S. 274 (2004)

Tennard was a capital death case in which the Supreme Court reversed the Fifth Circuit's refusal to grant a certificate of appealability to a state defendant who had filed a § 2254 habeas petition contending that a decision of the Texas Court of Criminal Appeals — holding that the petitioner had failed to present evidence demonstrating that his low IQ (69) "rendered him unable to appreciate the wrongfulness of his conduct when he committed the offense, or . . . rendered him unable to learn from his mistakes . . . or control his impulses" — was an unreasonable application of clearly established Federal law. *Id*. at 279 (quoting *Ex parte Tennard*, 960 S.W.2d 57, 62 (Tex. Crim. App. 1997) (*en banc*)).

The Fifth Circuit denied the certificate of appealability on the ground that

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[15] *See also Skipper*, 476 U.S. at 7 (observing that "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination") (footnote omitted). The omitted footnote stated that "evidence of adjustability to life in prison unquestionably goes to a feature of the defendant's character that is highly relevant to a jury's sentencing determination." *Id*. at 7 n.2.

Tennard had failed to show a causative nexus between his low IQ and the crime committed. Specifically, the Circuit Court held that the petitioner had failed to present "evidence of a 'uniquely severe permanent handicap with which the defendant was burdened through no fault of his own'" — *i.e.*, evidence of *mental retardation*, as opposed to a low IQ of 69 — "and *evidence that* '*the criminal act was attributable to this severe permanent condition*.'" *Tennard*, 542 U.S. at 281 (emphasis supplied) (quoting *Tennard v. Cockrell*, 284 F.3d 591, 595 (5th Cir. 2002)). *See also id*. at 283, 284 (same).

The Supreme Court reversed, saying that a test requiring a causative nexus between mitigation evidence and the crime committed, before allowing such evidence to be admitted, "has no foundation in the decisions of this Court. . . . [A] state cannot bar 'the consideration of . . . evidence if the sentencer could reasonably find that it warrants a sentence less than death.'" *Tennard*, 542 U.S. 284, 285 (quoting *McKoy v. North Carolina*, 494 U.S. 433, 441 (1990)).[16] "Impaired intellectual functioning

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[16] The Court also held that the Fifth Circuit erred when denying Tennard a certificate of appealability on the ground that he

> had not adduced evidence that his crime was attributable to his low IQ. In *Atkins v. Virginia*, 536 U.S. 304, 316 (2002), we explained that impaired intellectual functioning is inherently mitigating: "[T]oday our society views mentally retarded offenders as categorically less culpable than the average criminal." Nothing in our opinion suggested that a mentally retarded individual must establish a nexus between her mental capacity and her crime before the Eighth Amendment prohibition on executing her is triggered. Equally, we cannot countenance the suggestion that low

has mitigating dimension beyond the impact it has on the individual's ability to act deliberately." *Tennard*, 542 U.S. at 288.

iv. *Smith v. Texas*, 543 U.S. 37 (2004) (*per curiam*)

Smith v. Texas addressed the same issue decided in *Tennard*: *i.e*., a holding by the Texas Court of Criminal Appeals in an opinion issued just prior to the Supreme Court's decision in *Tennard* "that petitioner had offered '*no evidence of any link or nexus between his troubled childhood or his limited mental abilities and this capital murder*.'" *Id*. at 45 (emphasis supplied) (quoting *Ex parte Smith*, 132 S.W.3d 407, 414 (Tex. Crim. App. 2004)). The Supreme Court reversed for the same reasons it had rejected the Fifth Circuit's and the Texas Court's causative linkage requirements in *Tennard*.

> [N]one of our prior opinions "suggested that a mentally retarded individual must establish a nexus between her mental capacity and her crime before the Eighth Amendment prohibition on executing her is triggered" and holding that the jury must be allowed the opportunity to consider [such] evidence even if the defendant cannot establish "a nexus to the crime."

Smith, 543 U.S. at 45 (quoting *Tennard*, 542 U.S. at 287).

> IQ evidence is not relevant mitigating evidence . . . unless the defendant also establishes a nexus to the crime.

542 U.S. at 287.

c. Conclusion following reevaluation of *Strickland's* prejudice prong

Based upon the foregoing, it is clear that this court's previous analysis, and also that of the Alabama Court of Criminal Appeals, was erroneous for failing to properly weigh, according to constitutional standards, the additional mitigating evidence presented to the Rule 32 court when determining that Boyd had not shown prejudice from his attorneys' failure to present that evidence to the trial court judge during the sentencing hearing; and, as such, this court and the state court rendered a decision contrary to clearly established federal law.

The state appellate court determined that Boyd's additional background and character evidence was of little value, solely because there was no causal connection between his background and the crimes for which he was convicted. While that court accepted the evidence of Boyd's "troubled" background, it held that the evidence could only be significant mitigating evidence if Boyd established some nexus, or causal connection, between its effect and the crimes committed against the Blackmons.

By failing to recognize that Boyd's background evidence had any mitigating value due to the lack of its causal nexus to the crimes, the appellate court rendered a legal conclusion contrary to clearly established federal law regarding the purposes of

the penalty and sentencing phases of trial. "The primary purpose of the penalty phase is to insure that the sentence is individualized by focusing [on] the particularized characteristics of the defendant. By failing to provide such evidence to the jury, though readily available, trial counsel's deficient performance prejudice[s a petitioner's] ability to receive an individualized sentence." *Hardwick v. Crosby,* 320 F.3d 1127, 1162-63 (11th Cir. 2003) (quoting *Brownlee v. Haley*, 306 F.3d 1043, 1074 (11th Cir. 2002) (in turn quoting *Cunningham v. Zant*, 928 F.2d 1006, 1019 (11th Cir. 1991))) (alterations in original). *See also Armstrong v. Dugger*, 833 F.2d 1430, 1433 (11th Cir. 1988) (same); *Thomas v. Kemp*, 796 F.2d 1322, 1325 (11th Cir. 1986) (same).

"The penalty phase focuses not on absolving the defendant from guilt, but rather on the production of evidence to make a case for life." *Hardwick*, 320 F.3d at 1163 (quoting *Marshall v. Hendricks*, 307 F.3d 36, 103 (3d Cir. 2002)). In keeping with the philosophy that individualized sentencing in death penalty cases is of the utmost importance, the Supreme Court has long recognized that a defendant's troubled background is relevant mitigating evidence in the quest to determine his *moral culpability*. *See*, *e.g.*, *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); *Eddings*, 455 U.S. at 112; *Lockett*, 438 U.S. at 604.

Further, a determination of the appropriate weight to be given to mitigating

background evidence is not limited to whether that evidence can provide a causal basis or excuse for the crime the defendant has been convicted. "The question is simply whether the evidence is of such a character that it *might* serve as basis for a sentence less than death." *Tennard v. Dretke*, 524 U.S. at 283 (quoting *Skipper v. South Carolina*, 476 U. S. at 5 (in turn quoting *Lockett*, 438 U. S. at 604)) (emphasis supplied) (internal quotation marks omitted).

In sum, the postconviction opinion of the Alabama Court of Criminal Appeals erroneously failed to properly consider and weigh Boyd's mitigating background evidence because of his failure to demonstrate a causative linkage between that evidence and his crimes. Its decision accordingly is both contrary to, and represents an unreasonable application of, clearly established federal law.

As an aside, by insisting that Boyd failed to establish a nexus between his background and his crimes, and asserting that Boyd made a "choice" to commit the crimes, the Alabama Court of Criminal Appeals also came dangerously close to finding that the evidence was not relevant to the question of Boyd's "moral culpability." Such conclusions have been soundly rejected by the United States Supreme Court. When addressing the decision of the Oklahoma Court of Criminal Appeals finding the defendant's background to be irrelevant, and therefore not worthy of consideration as a mitigating circumstance, the Supreme Court wrote:

> The Court of Criminal Appeals . . . found that the evidence in mitigation was not relevant because it did not tend to provide a legal excuse from criminal responsibility. *Thus the court* conceded that Eddings had a "personality disorder," *but cast this evidence aside on the basis that* "*he knew the difference between right and wrong* . . . and that is the test of criminal responsibility." 616 P.2d, at 1170. Similarly, the evidence of Eddings' family history was "useful in explaining" his behavior, but it did not "excuse" the behavior. From these statements it appears that the Court of Criminal Appeals also considered only that evidence to be mitigating which would tend to support a legal excuse from criminal liability.
>
> We find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in *Lockett*. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. *But they may not give it no weight by excluding such evidence from their consideration*.

Eddings, 455 U. S. at 113-15 (emphasis added) (footnotes omitted).

In addition to its failure to properly consider the legal significance of the additional mitigating evidence, the Alabama Court of Criminal Appeals failed to correctly apply the appropriate *Strickland* standard of prejudice in cases peculiar to Boyd's, because it never evaluated the mitigation evidence presented at the penalty phase in conjunction with the evidence presented at the Rule 32 hearing in its weighing process.

> "[T]he [prejudice] question is whether there is a reasonable probability that, absent the errors, the sentencer — including an appellate court . . . would have concluded that the balancing of aggravating and mitigating circumstances did not warrant death. *Strickland,* 466 U. S. at 695, 104 S.Ct. at 2069. "The appropriate [constitutional] analysis of the prejudice prong of *Strickland* requires an evaluation of 'the totality of the available mitigation evidence--both that adduced at trial, and the evidence adduced in the habeas proceeding — in reweighing it against the evidence in aggravation.'" *Bottoson v. Moore*, 234 F.3d 526, 534 (11th Cir.2000) (quoting *Williams* [*v. Taylor*], 529 U.S. [362] at 397-98, 120 S.Ct. [1495] at 1515) [146 L.Ed.2d 389 [2000]; see *Clemons v. Mississippi*, 494 U.S. 738, 752, 110 S.Ct. 1441, 1450, 108 L.Ed.2d 725 (1990) (vacating state supreme court's upholding death sentence because it was not apparent that the appellate reweighing of the aggravating and mitigating factors accorded "defendant[ ] the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances" or "that the [state appellate] court fully heeded our cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence" required in a weighing state).

Hardwick v. Crosby, 320 F.3d 1127, 1165-66 (11th Cir. 2003).

The manner in which the appellate court weighed the mitigating evidence in Boyd's case represents an unreasonable application of the law, in light of the evidence before it. It is precisely the type of erroneous weighing the Supreme Court condemned in *Williams v. Taylor*, where the Supreme Court found that

> the State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence — both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation. *See Clemons v. Mississippi*, 494 U.S. 738, 751-752, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). This error is apparent in its consideration of the

> additional mitigation evidence developed in the postconviction proceedings. The court correctly found that as to "the factual part of the mixed question," there was "really . . . n[o] . . . dispute" that available mitigation evidence was not presented at trial. 254 Va., at 24, 487 S.E.2d, at 198. As to the prejudice determination comprising the "legal part" of its analysis, *id.*, at 23-25, 487 S.E.2d, at 198-199, it correctly emphasized the strength of the prosecution evidence supporting the future dangerousness aggravating circumstance.
>
> But the state court failed even to mention the sole argument in mitigation that trial counsel did advance [at the original sentencing hearing] — Williams turned himself in, alerting police to a crime they otherwise would never have discovered, expressing remorse for his actions, and cooperating with the police after that. While this, coupled with the prison records and guard testimony, may not have overcome a finding of future dangerousness, the graphic description of Williams' childhood, filled with abuse and privation, ... might well have influenced the jury's appraisal of his moral culpability.

Williams, 529 U.S. at 397-98. Like the Virginia court condemned in *Williams*, the Alabama Court of Criminal Appeals failed to evaluate the substance of the mitigating evidence adduced at the penalty phase of the trial, before considering it along with the additional mitigating evidence adduced at the Rule 32 hearing, and then reweighing the mitigating circumstances against the aggravating circumstances surrounding the crime. In fact, the appellate court reveals absolutely no information regarding the substance of the testimony presented in mitigation by the four witnesses during the penalty phase of the trial.[17] Instead, it simply recited portions of the trial

[17] This court's review of said testimony shows that Boyd's sister, Cindy Pierce, read into the record a chronological history of Boyd's life. (R. Vol. 5, Tab 25, pp. 974-990). While Pierce

court's 1988 sentencing order. These portions do not provide a complete picture of the aggravating and mitigating circumstances found by the trial court, and certainly do not provide any insight as to the mitigating evidence presented at trial. As such, the appellate court's conclusion that there was not a reasonable probability the additional mitigating evidence would have made a difference to the jury is fundamentally flawed. This error, combined with the court's failure to properly assess the additional mitigating evidence at the Rule 32 hearing, requires that the

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revealed information which included polite references to difficult financial times, family discord (which included simply not getting along with his stepfather), his grandparent's alcoholism and embarrassment over having a criminal for a father, this testimony did not lay open the true nature of Boyd's turbulent family history. *Id.* Instead, for the most part, neither the jury nor the trial judge was provided a portal through which they could observe the reality of Boyd's background. Pierce also discussed Boyd's job history, which showed that, with the exception of the time period he spent in New Mexico working for an uncle, Boyd had the initiative to seek and, with some success, maintain employment from the time he quit school at 15. Pierce stated that Boyd had cared for his mentally disturbed sister, and was a kind and loving uncle to her children. Pierce indicated that Boyd had always been quiet and polite, and hid his emotions well. Finally, she informed the jury that Boyd had been in legal trouble on several occasions, and admitted that Boyd had been convicted of burglary. Pierce explained that Boyd had expressed his remorse for the crime to her.

Boyd himself testified that he was very sorry for what had happened, was aware of the suffering endured by victims's daughter and his girlfriend, Julie Greenwood, and that he wished many times over again that he could undo what had occurred. *Id.* at 991-992. Miss Oliver, Boyd's mother, then testified that he was loved by his family, that he had been a loving, caring son who had never caused her any trouble as child, that he was loving and caring to animals and family, and who would willing help her and friends if needed, and that Boyd had expressed to her his deep sorrow for the hurt and pain he had caused. *Id*. at 992-999. After being asked a few questions about Boyd's history, Ms. Oliver stated that she allowed Boyd to go live his grandfather at age 12 due to the close nature of their relationship.

Finally, Boyd's pastor testified that he had been visiting Boyd in jail since his arrest, that Boyd had always been respectful to him, that in "heart to heart" talks Boyd had expressed his sorrow for what had happened. Boyd had informed the pastor that he was not guilty, but was very sorry that he had become involved the matter, and that he had turned his life over to God. *Id.* at 999-1000.

judgment affirming Boyd's death sentence be reversed and this action remanded to the trial court with instructions to assess the mitigating evidence presented at the Rule 32 hearing, and thereafter conduct a proper constitutional evaluation of mitigating factors adduced at trial and at the Rule 32 hearing in their entirety, before reweighing all of such evidence against the aggravating factors found in Boyd's case.

B. Part "II" of Boyd's Rule 59 Motion — *The issue of juror misconduct*

Boyd contends this court's original memorandum opinion erroneously held that his juror misconduct claim was precluded from Federal review because, during the Rule 32 proceedings in state court, the claim "had not been pled under Rule 32.1(e) as "'newly discovered evidence.'" Doc. no. 42 (Rule 59 Motion), at 14. The pertinent portion of this court's previous opinion provided that:

> The Alabama Court of Criminal Appeals affirmed the decision of Judge Laird, who found the claim procedurally barred pursuant to Rule 32.2(a), and subject to summary dismissal pursuant to Rule 32.7(d).
>
> > These issues were not pleaded [in the Rule 32 petition] and were therefore subject to the procedural bar pleaded by the State and accepted by the circuit court. The circuit court's ruling finding this claim precluded on procedural grounds was not error.
>
> *Boyd*, 746 So.2d at 406-407. The appellate court's decision rests upon state procedural rules that are adequate and independent grounds for denying relief. Thus, petitioner's claims are barred from review in this court.

Doc. no. 40 (Memorandum Opinion), at 150. The pertinent portion of the state appellate court's decision referenced above reads as follows:

> Boyd contends that the court that heard his Rule 32 petition committed reversible error in dismissing claims that are clearly cognizable in a Rule 32 postconviction proceeding. According to Boyd, these claims included: claims based on newly discovered evidence, which could not have been raised at trial; claims based on juror misconduct; claims based on the state's withholding exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); and claims based on the allegation that exculpatory evidence had been discovered from other witnesses. The circuit court refused to hear testimony at the Rule 32 hearing on any claim other than those alleging ineffective assistance of counsel, holding that all other issues were precluded and were subject to summary dismissal. Moreover, the trial court refused to allow Boyd to proffer expected testimony from these witnesses on these claims. [footnote omitted].
>
> Under Rule 32.1, Ala.R.Crim.P., subject to the preclusions in Rule 32.2, a remedy is afforded a defendant when the grounds supporting the requested relief are based on newly discovered facts (1) that were not known by petitioner or petitioner's counsel at the time of trial or sentencing or in time to file a post-trial motion pursuant to Rule 24, or in time to be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of reasonable diligence; (2) that were not merely cumulative to other facts that were known; (3) that were not merely amounting to impeachment evidence; (4) that if they had been known at the time of trial or of sentencing, the result probably would have been different; and (5) that establish that petitioner is innocent of the crime for which petitioner was convicted or should not have received the sentence that petitioner received. Rule 32.1(e)(1) through (5) Ala. R. Crim. P. Rule 32.3 places the burden on the defendant to *plead* and prove facts necessary to obtain relief. Rule 32.6(b) requires that the *petition* itself disclose the *facts* relied upon in seeking relief. Rule 32.6(b). [emphasis in original

opinion]. When this is done, the burden shifts to the state to plead preclusionary grounds meriting summary dismissal. [footnote omitted] Rule 32.3. The burden then shifts to the petitioner to disprove a preclusionary ground plead by the state.

We agree that the above assertions are not necessarily precluded by Rule 32.2(a), Ala. R. Crim. P. We must evaluate the record to determine whether the trial court's summary dismissal of these claims requires a remand for the circuit court to take additional testimony. The substance of Boyd's claims is presented in the following issues.

XXXVII.

Boyd contends that improper conduct by the jurors deprived him of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights as well as rights guaranteed by Alabama law. He argues that the reliability of the verdict in his case was severely compromised by the consideration of extraneous evidence by several jurors. E. W. W., an alternate juror, was a member of the Calhoun County volunteer fire department when the victims disappeared. Juror W. was involved in the search for victims in this case, had been to the crime scene, had seen some of the evidence, and was generally knowledgeable about the case. According to Boyd, Juror W. "shared his knowledge with other jurors once the case began." (Appellant's brief at p. 117.) Also according to Boyd, juror B.M. impermissibly consulted a dictionary during the trial. Boyd argues that "jurors did consider extraneous evidence--about the crime . . .[and the law] – in deciding Mr. Boyd's fate, and that cannot be countenanced by this or any other court.... Boyd's capital conviction and death sentence cannot stand in light of such evidence." (Appellant's brief at p. 119.)

Boyd filed his Rule 32 petition on July 5, 1990. The above issues were not raised in the petition. The trial court summarily dismissed the petition. On December 4, 1990, the circuit court heard Boyd's motion to reconsider the summary dismissal of the petition. The State conceded at this hearing that Boyd was entitled to be heard on his claims of ineffective assistance of counsel and any claims alleging newly discovered evidence. (Vol.16, R. 4.) At the conclusion of the hearing,

the trial court stated that it would take the motion under advisement and "try to get an order out, if possible, by the end of the week." The court stated that if the motion to reconsider was granted and the petition was reinstated, pending discovery motions would be ruled on. The circuit court also noted that an amended Rule 32 petition had been filed and would be taken up if it granted the motion to reconsider. The motion to amend was filed on November 30, 1990, and did not include the above issues. Monday April 1, 1991, at a hearing on the discovery motions, the judge stated that he "thought [he] had entered an order setting aside [his] previous order dismissing the petition" but the record reflected that he had not. (Vol.16, R. 11.) The circuit court stated in regard to granting the motion to reconsider:

"I intended to do so. I was going to set that order [dismissing the petition] aside and allow the petitioner to go forward on the grounds of ineffective assistance of counsel only, and I'll try to work on an order and get that out in the near future. I thought I had already done that, but not having done that, that's my intention in this point."

(Vol.16, R. 12.) Boyd objected "for the record" to the dismissal of those of his claims other than ineffective assistance of counsel. (Vol.16, R. 25.) Boyd filed a second amended petition on July 8, 1994, in which he asserted the above issues in the following fashion:

"110. Mr. Boyd was deprived of a reliable verdict by the fact that members of his jury had extraneous information about the victims and the crime scene and other aspects of this case.

"111. Members of the jury also had connections with law enforcement and investigation efforts in this case that rendered them unfit to sit on petitioner's jury.

"112. The jurors were not forthcoming with this information before they sat in judgment on petitioner's life and liberty."

(Vol. 3, C.R. 48.) These claims were not presented as newly discovered evidence. There was not even the bare assertion in the petition that

these claims were newly discovered evidence. The State filed a motion for partial dismissal in which it addressed certain claims of ineffective assistance of counsel as being insufficiently pleaded. (Vol. 3, C.R. 439.) The State also filed an answer to Boyd's second amended petition in which it alleged that the above claims were procedurally precluded by Rule 32.2(a)(3) and (a)(5), or in the alternative, should be denied. The day before the Rule 32 hearing the circuit court issued a written order correctly dismissing these claims as precluded by Rule 32.2(a) and subject to summary dismissal pursuant to Rule 32.7(d). Immediately preceding the Rule 32 hearing, the trial court conducted a prehearing conference. At this hearing the presiding judge asked what witnesses the defense was going to call. Boyd's counsel stated that several jurors would be called, because "We have a claim in here that there was some misconduct on the part of the jurors." (Vol.16, R. 94.) The circuit court stated that it would not hear arguments concerning this issue because it had dismissed that issue by written order the previous day. (Vol.16, R. 95.)

These issues were not pleaded as newly discovered facts and were therefore subject to the procedural bar pleaded by the State and accepted by the circuit court. The circuit court's ruling finding this claim precluded on procedural grounds was not error.

Having received the circuit court's order at the prehearing conference, Boyd filed a motion to reconsider. This motion did not allege the claims presented newly discovered facts. This motion was properly denied.

During the hearing Boyd requested that the circuit court hear his proffer through the witness as to what the testimony would have been so that there would be a full record for appeal. The trial court denied the request. (Vol.16, R. 126.) Boyd alleged that this was error. Because the issue had been procedurally precluded it was not properly before the circuit court. Therefore, the trial court did not error in refusing to hear the proffer.

Boyd v. State, 746 So.2d 364, 405-07 (Ala. Crim. App. 1999) (footnotes omitted).

After careful consideration of the arguments of petitioner and respondent, this court concludes that petitioner is correct — but only to the extent that Boyd contends this court expressly relied on those portions of the Alabama Court of Criminal Appeals' opinion quoted above in finding this claim to be procedurally defaulted. Regardless, the only *portion* of the claim that is of any real concern is petitioner's assertion that he was denied a fair trial because juror Lori Boozer heard alternate juror Eddie Williams discussing allegedly extraneous evidence about the case.[18]

Specifically, Boyd contends that juror Lori Boozer overheard alternate juror Eddie Williams state that he, in his capacity of volunteer firefighter, had been to the crime scene and witnessed the recovery of Mr. Blackmon's car and body after

[18] The court realizes that Boyd is alleging that juror Eddie Williams' purported failure at *voir dire* to reveal he was a volunteer firefighter who had assisted with recovery efforts pertaining to Mr. Blackmon. However, Williams was an alternate juror, did not deliberate and render any verdict, and, as such, could not have actually prejudiced Boyd in any way. As for Juror Malkove, Boyd alleges she consulted a dictionary during trial, but never reveals any additional detail. Again, Boyd cannot maintain a juror misconduct claim on such a conclusory assertion as he cannot establish he was prejudiced in any way by Malkove's actions. This footnote is placed herein so that it is clearly understood to the reader that the court has not overlooked any assertion of juror misconduct by Boyd.

For reasons set out in the body of this memorandum opinion, the court does find that the juror misconduct claims are not procedurally defaulted. However, among the three species of juror misconduct claims, only the claim that alternate juror Williams conveyed extrinsic evidence to jurors merits lengthy discussion. In any event, as can be seen in this footnote and the conclusions about this claim in this memorandum opinion, the juror misconduct claims are not meritorious. Although the court has seen fit to rely on its own analysis of the claim, rather than the state's procedural bar referenced in its original memorandum opinion (doc. no. 40), Rule 59(e) does not require the court to alter or amend the judgment as to this claim because to do so would serve no useful purpose.

testimony had been admitted concerning the car and a barrel.[19] Boozer also stated that Williams described what he witnessed in detail, knew something about the search for weapons, and seemed to know "a lot" about the case.

When this extraneous evidence claim was raised by Boyd in 1994, the legal basis for such claims under Alabama procedural rules, if made for the first time on post-conviction review, was not firmly established or regularly followed. Specifically, Alabama appellate courts had not made it clear whether the claim should be brought pursuant to Alabama Rules of Criminal Procedure 32.1(a), or 32.1(e).[20] Those provisions read as follows:

> **Rule 32.1 Scope of Remedy**
> Subject to the limitations of Rule 32.2, any defendant who has been convicted of a criminal offense may institute a proceeding in the court of original conviction to secure appropriate relief on the ground that:
>
> **(a)** The constitution of the United States or of the State of Alabama requires a new trial, a new sentence proceeding, or other relief.
>
> . . . .
>
> **(e)** Newly discovered material facts exist which require that the

---

[19] Mrs. Blackmon's body was discovered in barrel at later date and at a different location, and since juror Lori Boozer asserts that alternate juror Eddie Williams only discussed recovery of Mr. Blackmon's vehicle and body, it does not appear that Williams was privy to first hand information about Mrs. Blackmon.

[20] *See*, *e.g.*, *State v. Freeman*, 605 So.2d 1258 (Ala. Crim. App. 1992); *State v. Gilbert*, 568 So.2d 876 (Ala. Crim. App. 1990).

conviction or sentence be vacated by the court, because:

> (1) The facts relied upon were not known by petitioner or petitioner's counsel at the time of trial or sentencing or in time to file a post-trial motion pursuant to Rule 24, or in time to be included in any previous collateral proceeding be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of reasonable diligence;
>
> (2) The facts are not merely cumulative to other facts that were known;
>
> (3) The facts do not merely amounting to impeachment evidence;
>
> (4) If the facts had been known at the time of trial or of sentencing, the result probably would have been different; and
>
> (5) The facts establish that petitioner is innocent of the crime for which petitioner was convicted or should not have received the sentence that petitioner received.

It is apparent that the Alabama Court of Criminal Appeals — the last state court to examine this claim — affirmed the trial court's procedural default of the juror misconduct claim based upon a premise that the claim was based upon Alabama Rules of Criminal Procedure 32.1(e)(1)-(5). However, it is now settled that the grounds for juror misconduct claims of the type alleged by Boyd are better based upon Rule 32.1(a), because Boyd specifically alleges that he was denied a fair trial by an impartial jury, as required by the Sixth and Fourteenth Amendments to the

United States Constitution. *See e.g., Ex Parte Pierce*, 851 So.2d 606 (Ala. 2000). In *Pierce*, the Alabama Supreme Court wrote as follows:

> Pierce's claim states a proper ground for relief under Rule 32.1(a) because it states a constitutional violation that would require a new trial. To be entitled to that relief, however, Pierce must avoid the preclusive effect of Rule 32.2(a)(3) and (5); those provisions bar a defendant from presenting in a Rule 32 postconviction petition a claim that could have been raised at trial or on direct appeal. . . .
>
> * * * *
>
> The Court of Criminal Appeals stated that Pierce had failed to prove that his evidence regarding the sheriff's improper contact with the jury constituted newly discovered evidence; therefore, it held, the trial court correctly held this claim to be procedurally barred on the basis that it could have been raised at trial or on direct appeal. The Court of Criminal Appeals held that Pierce did not satisfy the following three of the five elements required by Rule 32.1(e), Ala. R.Crim. P.: 1) that the information was not known and could not have been discovered at the time of trial or sentencing or in time to raise it in a posttrial motion; 2) that if the information had been known at the time of trial or of sentencing, the result probably would have been different; and 3) that [t]he facts establish that the [defendant] is innocent of the crime or that he "should not have received the sentence [he] received."
>
> However, Pierce was not required to prove that this information meets the elements of "newly discovered material facts" under Rule 32.1(e). While the information about Sheriff Whittle's contacts with the jury may be "newly discovered," Pierce does not seek relief under Rule 32.1(e). Pierce does not contend that "[n]ewly discovered material facts exist which require that the conviction or sentence be vacated by the court." Rule 32.1(e). Instead, Pierce's claim fits under Rule 32.1(a): "The constitution of the United States or of the State of Alabama requires a new trial . . . ." Rule 32.1(a) states a ground for relief distinct from that stated in Rule 32.1(e). If every defendant had to prove that the

facts on which he relies for postconviction relief satisfy the elements of "newly discovered material facts" set out by Rule 32.1(e), then constitutional violations could rarely be raised in a Rule 32 petition, and Rule 32.1(a) would be superfluous for all cases except those in which the defendant could prove innocence. There is a place for this Court to review constitutional violations that could not be discovered by the date of trial or in time to be raised in a direct appeal, even if the defendant is guilty of the crime charged. Furthermore, the application of the requirements of Rule 32.1(e) in cases like Pierce's would impose a nearly impossible standard on a defendant filing a Rule 32 petition. A defendant could rarely, if ever, establish, through the same facts tending to prove that the jury was prejudiced or improperly influenced, that he is innocent of the crime charged. Yet, jury prejudice or improper influence is an important issue for this Court to review.

Rule 32.1(a) is the same provision that allows a defendant to raise an ineffective-assistance-of-counsel claim in a postconviction proceeding. Yet, this Court has never required a defendant alleging ineffective assistance of counsel to meet the elements stated in Rule 32.1(e), particularly the Rule 32.1(e)(5) requirement of showing facts establishing that the defendant is innocent of the crime. Almost never could a defendant meet the requirement of showing that his evidence proving ineffective assistance also proves his innocence.

Although Rule 32.1(e) does not preclude Pierce's claim, Rule 32.2(a)(3) and (5) would preclude Pierce's claim if it could have been raised at trial or on appeal. Pierce argues that his trial counsel could not have known about the sheriff's improper close and continual contact with the jury. . . .

* * * *

As previously stated, because Pierce's claim falls under Rule 32.1(a), rather than Rule 32.1(e), the elements of Rule 32.1(e) do not apply. A requirement that a defendant prove those elements would create a nearly impossible standard. Instead, Pierce need only show that his claim could not have been raised at trial or on direct appeal.

* * * *

When Pierce filed his Rule 32 petition, he was relying on the Court of Criminal Appeals' opinion in *State v. Freeman,* 605 So.2d 1258 (Ala. Crim. App. 1992), which held that a Rule 32 petitioner's claim alleging a juror's misconduct in failing to truthfully answer questions on voir dire examination was not procedurally barred by Rule 32.2, where defense counsel was not aware of the juror's failure to truthfully answer until one week before the court conducted the evidentiary hearing on the defendant's Rule 32 petition. [footnote omitted]. In *Freeman,* the defendant's counsel uncovered the information during juror interviews. Thus, the Court of Criminal Appeals held that the issue was not procedurally barred because "the fact that the juror had been a policeman [that fact was the information withheld] was not known at the time of trial or at the time of direct appeal." 605 So.2d at 1259.

Similarly, in Pierce's case, during postconviction investigation, Pierce's current counsel interviewed jurors and discovered the improper contact Sheriff Whittle had had with the jurors. Based on the Court of Criminal Appeals' opinion in *Freeman,* Pierce's claim was cognizable as long as he established that the information was not known, and could not reasonably have been discovered, at trial or in time to raise the issue in a motion for new trial or on appeal. Pierce argued to the trial court, in his response to the State's contention that the issue was procedurally barred, that, on the authority of *Freeman,* the issue could not be barred, because the information was not available to trial counsel and could not have been obtained at the time of the trial. [The question then became whether] Pierce met his burden under Rule 32.3 of disproving the existence of the ground of preclusion by a preponderance of the evidence . . . [and] whether Pierce had the opportunity to adequately present evidence showing he had met his burden under Rule 32.3.

Ex parte Pierce, 851 So.2d 606, 612-617 (Ala. 2000) (alterations added).

Thus, after Boyd raised his juror misconduct claim in July 1994, and the State

answered in August of 1994 that the claim was precluded by Alabama Rule of Criminal Procedure 32.2(a)(3) and (5) — because it could have been, but was not raised at trial or on direct appeal — the "burden" shifted to the petitioner pursuant to Alabama Rule of Criminal Procedure 32.3 to

> disprove [the preclusionary ground's] existence by a preponderance of the evidence. Moreover, pursuant to Rule 32.9(a) . . . , "The court in its discretion may take evidence by affidavits, written interrogatories, or depositions, in lieu of an evidentiary hearing, in which event the presence of petitioner is not required." An evidentiary hearing need not be held if the trial court has before it "facts supporting the position of each party [that] are fully set out in . . . supporting affidavits." *Johnson v. State*, 564 So.2d 1019, 1021 (Ala.Cr.App. 1989).

Magwood v. State, 689 So.2d 959, 963 (Ala. Crim. App. 1996).

When the parties appeared for an evidentiary hearing in the state Rule 32 court on September 8, 1994, Boyd was prepared to call "several of the jurors" with pertinent information regarding misconduct. *See* PCR, Vol. 16, at 94.[21] Immediately before the hearing was to begin, however, the Rule 32 court judge informed Boyd's counsel that he would not be allowed to call the jurors as witnesses, because he (the trial judge) had just signed an order summarily dismissing the juror misconduct claims on the preclusionary grounds asserted by the State of Alabama. *Id.* at 95 and

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[24] **PCR**" refers to the state post-conviction record. The original record, filed on Nov. 20, 1997, consisted of twenty volumes. Citations to this twenty-volume record include a reference to the volume number). *See* doc. no. 40 (original memorandum opinion), at 23 n.17.

100.

During the Rule 32 evidentiary hearing that followed, when Boyd's counsel attempted to examine one of the attorneys who had represented Boyd at trial and on direct appeal (Mr. Levinson) about questions that the attorney had asked prospective jurors during *voir dire* about associations with law enforcement and knowledge of the facts of the case, the Rule 32 court judge again refused to allow Boyd's counsel to either pursue that line of questioning or make an offer of proof. *Id.* at 125-126.

Although the *voir dire* conducted by the parties was not transcribed by the trial court's official court reporter, several questions asked by the trial judge were recorded and transcribed. Additionally, the individual *voir dire* of several jurors concerning the subject of pretrial publicity matters was recorded, along with motions to excuse certain jurors for bias pertaining to publicity and the death penalty. Finally, the names of each of the jurors and alternate jurors actually chosen were transcribed into the record upon being seated in the jury box. Even so, none of that information gives any clue regarding what dialogue, if any, took place between the parties, the court and Eddie Williams. All of this information is pertinent to determining whether trial counsel should, or could, have known of Williams' involvement in the recovery efforts at the time of trial or on direct appeal.

Finally, this court must point out that the lack of response by alternate juror

Williams to some of the questions directed by the trial court to members of the venire raises suspicions, even though it has never been mentioned by Boyd.

> [THE COURT:] Ladies and Gentleman, the defendant in this case was indicted by a grand jury on April 25, 1986 for the offense of capital murder of Evelyn Holmes Caine Blackmon and Fred Leonard Blackmon. The foreman of that grand jury was Wayne Fair. A capital offense is the offense for which the punishment is either life without parole or death.
>
> I want to ask you certain questions now about your qualifications to sit as jurors in this particular case. If any of these questions I ask apply to you, please raise your hand and let me know.
>
> * * * *
>
> Do any of you have an interest in the conviction or the acquittal of the defendant?
> (No audible response.)
>
> Have any of you made any promise of given any assurance that you will convict or acquit the defendant in this case?
> (No audible response.)
>
> Do any of you have a fixed opinion as to the guilt or innocence of the defendant which would bias your verdict?
>
> * * * *
>
> All right. Are any of you a witness in this case?
> [Williams does not respond].
> . . . .
>
> Do any of you know any reason whatsoever as to why you cannot sit as a fair and impartial juror for both the state and the defendant?
> [Williams does not respond].

R., Vol. 2, at 289, 290, and 293.[22]

The capricious refusal of the Rule 32 court judge to allow Boyd's counsel to either elicit testimony from alternate juror Eddie Williams, or make an offer of proof, effectively and wrongfully prevented Boyd from disproving the existence of the grounds of preclusion raised by the State, as Boyd was entitled to do — indeed, he was required to do so — under Alabama Rule of Criminal Procedure 32.3.

Further, the subsequent, unreasonable refusal of the Rule 32 court judge to consider the proffers of proof submitted in support of Boyd's motions for reconsideration continued the insult. Those proffers included affidavits from regular juror Lori Boozer and alternate juror Eddie Williams. The pertinent portion of juror Boozer's affidavit reads as follows:

> I recall a juror that sat on the case called Mr. Williams. He had been to the scene of the crime when the victims' car was taken out of the river and when the barrel was taken out of the river and had participated in the search for the victims. He was very knowledgeable about the case. Before trial, I remember hearing him say that he would never be chosen because he knew about the case. When the testimony came in about the car and the barrel, he talked about seeing the evidence and about having seen the male victim in the back of the trunk of the car. He also had knowledge about the search for the guns.

PCR, Vol. 4, at 740-41.[23] The pertinent portions of alternate juror Eddie Williams'

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[22] References to "R" are to page in the record of petitioner's 1987 trial proceedings.

[23] *See supra* note 21.

affidavit reads as follows:

> I am the Chief of the Volunteer Fire Department. . . . I participated in the search with the Volunteer Fire Department. I was at the scene where they found the tail light lens and some of the chrome off the car on Dark Hollow Road. I was directing traffic, trying to keep people from coming into the scene. . . . I didn't feel like I would be picked to serve on the jury.

Id. at 743-44.

The Rule 32 court judge should have allowed Boyd's post-conviction defense-counsel to make such proffers in order to satisfy Boyd's burden to prove, by a preponderance of the evidence, that trial and appellate counsel could not have known at trial or on direct appeal that alternate juror Eddie Williams possessed factual knowledge about the case that, if communicated to the regular jurors who actually deliberated on verdicts, would constitute impermissible extraneous evidence.

The stance taken by the state appellate court is equally flawed, but for a different reason. It appears that the Alabama Court of Criminal Appeals viewed Boyd's extraneous evidence claim entirely in the context of Alabama Rule of Criminal Procedure 32.1(*e*), a ground that on its face requires a petitioner to *plead* that newly discovered evidence has been found. There is no such requirement under Rule 32.1(*a*), nor has the Alabama court system clearly carved out such a requirement for juror misconduct claims based upon facts similar to those presented in this case.

The state appellate court's error becomes clear when its opinion concerning the subject is viewed in its entirety.

Boyd's extraneous evidence claim is not procedurally barred. Boyd brought the claim to the trial court's attention in the proper manner, but was arbitrarily denied the opportunity to disprove the procedural bar raised by the capricious actions of the Rule 32 court judge. A careful review of Boyd's evidentiary proffers and the record shows, by at least a preponderance of the evidence, that trial counsel could not have known about the involvement of alternate juror Williams in recovery of the Mr. Blackmon's automobile and body, or his extraneous influence upon the regular jurors who actually deliberated upon verdicts. Thus, petitioner was entitled to have the merits of his claim examined.

The error continued at the appellate level, where the Alabama Court of Criminal Appeals found that Boyd was procedurally required to plead "newly discovered evidence" in his petition by implicitly (and erroneously) holding that his claim had to be premised upon Alabama Rules of Criminal Procedure 32.1(e)(1)-(5).

For all of these reasons, this claim is now before this court on *de novo* review.

Boyd was entitled, under the Sixth and Fourteenth Amendments to the United States Constitution, to a fair and impartial jury. "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever

watchful to prevent prejudicial occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). Nevertheless, it is only when the petitioner makes "a colorable showing of extrinsic influence that the court must investigate the asserted impropriety." *United States v. Siegelman*, 467 F. Supp. 2d 1253, 1273 (M.D. Ala. 2006) (citing *United States v. Winkle*, 587 F.2d 705, 714 (5th Cir. 1979)).

The jury in Boyd's case was directed to abide by the trial court's instruction that the only evidence that could be considered was the testimony heard from the witness stand, and those documents and tangible exhibits admitted into evidence. R. Vol. 2, at 309.[24] Moreover, "[t]he 'trial by jury' portion of the Due Process clause necessarily means those jurors look only at the evidence presented to them from the witness stand." *Parker v. Head*, 244 F.3d 821, 839 (11th Cir. 2001). Therefore, extrinsic evidence is "any information other than the information that the jury received from the court's instructions on the law, the factual evidence presented in this case through witness testimony from the witness stand, and factual evidence presented in the case through exhibits properly admitted at trial." *Siegelman*, 467 F. Supp. 2d at 1265.

Respondent argues that the factual information communicated in the jury room by alternate juror Williams was not extrinsic evidence in the following manner:

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[24] *See supra* note 22.

> Without waiving the procedural default, the State generally comments on the three affidavits that were attached to Boyd's evidentiary proffer. Contrary to Boyd's contention, none of the affidavits, even as artfully drawn as they are, do not support [sic] the conclusion that the jury considered extraneous information in convicting Boyd. . . .
>
> The . . . affidavits [of alternate juror Williams and juror Lori Boozer] mention matters on which evidence was introduced at trial. Therefore, the affidavits do not support the conclusion that the jurors considered extraneous information.

Doc. no. 20 (Respondent's brief on the merits), at 59.

Respondent's argument is without merit. The information shared by alternate juror Williams most certainly did not come within the trial court's instruction. As such, Boyd unquestionably made a colorable showing of extrinsic influence on the jury.

Jury exposure to extrinsic evidence is presumed to be prejudicial. *See*, *e.g.*, *Parker*, 244 F.3d at 839 (citing *Remmer v. United States*, 347 U.S. 227, 229 (1954)). "The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Remmer,* 347 U.S. at 229 (citations omitted). In this regard, the Eleventh Circuit observed in *United States v. Ronda*, 455 F.3d 1273 (11th Cir. 2006), that:

> To rebut the presumption of prejudice, the government must show

> that the jurors' consideration of extrinsic evidence was harmless to the defendant. To evaluate whether the government has rebutted that presumption, we consider the totality of the circumstances surrounding the introduction of the extrinsic evidence to the jury. The factors we consider include: (1) the nature of the extrinsic evidence; (2) the manner in which the information reached the jury; (3) the factual findings in the district court and the manner of the court's inquiry into the juror issues; and (4) the strength of the government's case.

Id. at 1299-1300 (citations omitted).

Moreover, and significantly, it is understood that "[n]ot every case in which a jury has been exposed to extrinsic evidence results in findings that a new trial must be granted." *Siegelman*, 467 F. Supp. 2d at 1273 (citing, *e.g., United States v. Ronda*, 455 F.3d 1273, 1299 (11th Cir. 2006); *United States v. Bolinger*, 837 F.2d 436, 440-41 (11th Cir. 1988)).

While this court does not agree with respondent's assertion that the information shared by Williams was not extrinsic evidence, it does find respondent's underlying support for that assertion to be persuasive rebuttal to what must be considered, at this juncture, as *presumptive* prejudice created by juror exposure to such information. As such, the following portion of respondent's argument bears repeating: "The . . . affidavits [of alternate juror Williams and juror Lori Boozer] mention matters on which evidence was introduced at trial." Doc. no. 20 (Respondent's brief on the merits), at 59.

This court has carefully examined the record and finds that, indeed, all information conveyed by alternate juror Williams to juror Boozer had been admitted into evidence through the testimony of several witnesses who were at the scene where Mr. Blackmon's automobile and body were recovered, photographs taken of the scene, and autopsy photographs. (R. Vols. 2-4).

The jury also heard testimony concerning Boyd's statement to the police, in which he described what had happened to each of the Blackmons in some detail, and revealed locations where evidence could be found. *See* R. Vol. 3, at 526-569. Boyd accompanied law enforcement to assist with the recovery of the murder weapons. *Id.* at 549-52.

When this court considers the totality of the circumstances surrounding the extrinsic evidence conveyed by Williams to Boozer, and perhaps other, unidentified members of the jury, it finds that the exposure did not create a reasonable possibility of prejudice against Boyd. The jury was keenly aware of any information that Williams possibly could have conveyed through his observations by way of numerous eyewitnesses whose testimony from the stand corroborated one another. Finally, the evidence against Boyd was overwhelming. Based upon the foregoing, this court finds Boyd was not prejudiced by Williams's actions, and Boyd was not denied his Sixth Amendment right to trial by a fair and impartial jury.

III. CONCLUSION AND ORDERS

For the foregoing reasons, the arguments asserted in Part "I" of Boyd's Rule 59 motion to alter or amend the judgment are sustained. The state appellate court's conclusion that there was not a reasonable probability the additional mitigating evidence would have made a difference to the jury or, more importantly, to the trial court judge who rejected the jury's advisory verdict and imposed a sentence of death, is fundamentally flawed. That error, combined with the arbitrary and capricious refusal of the state Rule 32 court judge to properly assess the additional mitigating evidence that counsel attempted to present at the Rule 32 hearing, requires that the judgment affirming Boyd's death sentence be, and it hereby is, REVERSED. It is ORDERED that this action be, and it hereby is, REMANDED to the state trial court with instructions to assess the mitigating evidence that Boyd's attorneys attempted to present at the Rule 32 hearing, and thereafter to conduct a proper, *constitutional* evaluation of *all* mitigating factors adduced at trial and at the Rule 32 hearing, *in their entirety*, before re-weighing all of such evidence against the aggravating factors found in Boyd's case.

The arguments asserted in Part "II" of Boyd's Rule 59 motion are overruled and DENIED, because a different holding would serve no useful purpose.

DONE and ORDERED on this 28th day of September, 2007.

United States District Judge